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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL COFFEE CLENDENIN et al.,

Defendant and Appellant.

F074316

(Merced Super. Ct.  
Nos. 15CR00961A & 15CR00961B)

**OPINION**

APPEAL from a judgment of the Superior Court of Merced County. Donald E. Shaver, Judge. (Retired Judge of the Stanislaus Sup. Ct. assigned by the Chief Justice pursuant to article VI, § 6 of the Cal. Const.)

Steven A. Torres, under appointment by the Court of Appeal, for Samuel Clendenin, Defendant and Appellant.

Barbara A. Smith, under appointment by the Court of Appeal, for Anthony Clendenin, Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and David A. Lowe, Deputy Attorneys General, for Plaintiff and Respondent.

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## **INTRODUCTION**

Appellant/defendant Anthony Mark Clendenin and his adult son, appellant/defendant Samuel Coffee Clendenin,<sup>1</sup> were each charged and convicted after a joint jury trial of one count of animal cruelty (Pen. Code, § 597, subd. (a)),<sup>2</sup> with enhancements for each defendant for the personal use of a deadly and dangerous weapon in the commission of the offense – that Anthony used a stick and Samuel used a baseball bat. (§ 12022, subd. (b)(1).) The charges resulted after defendants called the police and reported their neighbor’s dog had jumped into their backyard, and they acted in self-defense and beat it to death. However, the family that owned the dog had security cameras that recorded the incident and refuted defendants’ stories, and showed the dog was in the defendants’ backyard and tried to get away from them, but Samuel stepped on the dog’s chest and held a baseball bat on it while Anthony, his father, beat the dog with a wooden stick.

In this joint appeal, defendant Samuel contends the court should have given a cautionary instruction that Anthony’s pretrial statements could not be considered against him. Both defendants argue the deadly weapon enhancements must be reversed as a matter of law because they can only be imposed when the substantive offense is committed against a human being and not an animal. We affirm.

## **FACTS**

Muang Saechao and Low Yao Saeturn had lived in a house in a residential area of Merced since 2004. In the summer of 2014, Kimberly Saesee (Kimberly), their niece, moved in with them.

In approximately 2009 or 2010, defendant Anthony Clendenin (Anthony) and his family moved into the house immediately north of the Saesee family’s residence. The

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<sup>1</sup> According to the probation report, Samuel was born in 1990.

<sup>2</sup> All further statutory citations are to the Penal Code unless otherwise indicated.

residents of the Clendenin house included Anthony's wife, Deanna; their adult sons Anthony, Jr. and defendant Samuel (Samuel); and Samuel's wife and young child.<sup>3</sup>

The two residences were directly adjacent to each other, with a fence and side yards between them. The Saesee family had installed security cameras that recorded their own front and backyards, their driveway, and the side of their house. One camera also covered part of defendants' adjacent side yard. The Saesee family could view the security video footage on their television and download and save the videos.

The Saesee family had a male German Shepherd dog named Kuma. It was two years old in January 2015. Kuma was the family pet and was energetic and playful and lived in the family's backyard. Kuma weighed 70 to 80 pounds.

Kimberly testified that the family that lived directly north of defendants' house owned two German Shepherds.

Kimberly and her aunt testified their family did not have a relationship with defendants. Kimberly testified that since April 2014, her uncle and aunt had problems with defendants.

Officer Gallegos of the Merced Police Department testified that officers had responded "a few times" in 2014 because of "some type of rift" between the Saesee family and defendants.

On April 20, 2014, Officer Rodriguez responded to the residence of the Saesee family, when they reported that someone at defendants' house was spraying a water hose across the fence at their dog, Kuma. Officer Rodriguez spoke to Anthony, who said the dog was "constantly barking so, he decided to spray the house with the water hose in hopes of shutting the dog" up. No one was arrested.

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<sup>3</sup> Given the similar last names, we will refer to some parties by their first names to avoid confusion. All references to "Anthony" are to defendant Anthony Sr., unless otherwise indicated.

### **The family discovers the dog is missing**

Around 8:00 p.m. on January 16, 2015, Kimberly was inside her family's house and doing homework. Her aunt came into her room and seemed panicked and told Kimberly to go outside. Her aunt kept saying, " 'My Kuma. My Kuma.' "

Kimberly ran into the backyard and called for Kuma; she knew something was wrong. She went back into the house and called the police.

Kimberly also called her cousin for help. The cousin lived around the corner from the Saesee family with her brother, Eddie Saechao (Eddie). Eddie was with the cousin when his sister called for help. Eddie testified he overheard the words " 'kill' " and " 'Kuma' " during the telephone call from his sister. Eddie and his cousin immediately ran to their aunt's house; they arrived in about two minutes. Eddie testified that as he ran, he heard a dog crying, and all the dogs in the neighborhood were barking.

Eddie testified that when he got to his aunt's house, he asked his sister where Kuma was. She replied that Kuma was " 'on the other side of the yard.' " Eddie went into his aunt's backyard to look for the dog.

Eddie testified that as he looked for Kuma, he heard someone moving a trash can. Eddie then heard the voice of a young male say: " 'Wow, what a bloody mess. We finally got that f[\*\*]ker.' "

### **The initial investigation**

At approximately 8:16 p.m., Officer Opinski and other officers responded to a 911 call from defendants' house reporting an animal disturbance in their backyard. Opinski contacted Anthony and his son, Samuel, at their house and had a brief conversation with them. They said the neighbor's dog got into their backyard, and the dog was killed in self-defense.

Officer Opinski went into defendants' backyard and found Kuma near the house. The dog was dead and there was a pool of blood around its head.

A wooden stick was on the ground next to the dog. The stick was approximately 26 inches long and appeared to have blood on it.

Officer Gallegos went into defendants' backyard and found a broken fence board. It had been pushed out from defendants' yard into the Saesee family's yard. Officer Flores also saw the broken board and testified it appeared the wooden fence plank had been kicked into the Saesee family's yard.

#### **Officer Opinski's first recorded conversation with both defendants**

Officer Opinski was equipped with a "body cam" unit that recorded his conversations with defendants Anthony and Samuel. All these conversations occurred at defendants' house shortly after the officers responded to the 911 call that night. The prosecution introduced four separate videos of these conversations.

In the first recorded conversation, Officer Opinski spoke to Anthony, his wife Deanna, and their son Samuel about what happened. Deanna said she had called 911.

Samuel said the dog was stronger than he looked. Officer Opinski asked if he "did that with that stick." Samuel and Anthony said yes, and Anthony added that there was a bat there somewhere. Deanna told Anthony and Samuel they had to take off their shoes before they went inside. Anthony said there was blood everywhere on his shoes.

Officer Opinski asked defendants if it was the neighbor's dog. Samuel said yes, and that the dog jumped "clean over the fence. I mean just clean over the fence." Anthony said: "We can't even come over here and put garbage man. I try to sneak and put my garbage and he's trying to clear it." Anthony said it had been "an on-going problem," and Samuel said "[t]hat's where he tried to push me into the fence right there."

After this conversation, Officer Opinski contacted his supervisor and another officer who had responded to prior calls between the two families.

#### **Officer Opinski's second recorded conversation; interview with Samuel**

The prosecution introduced the second videotaped conversation in which Officer Opinski spoke to Samuel by himself.

Officer Opinski asked Samuel for his identification. Samuel presented it and added: “Crazy, haha. Didn’t think that was going to stare me in the face right when I go into the backyard.”

Officer Opinski asked Samuel what happened. Samuel said he went to the backyard and had his gun with him, and the “next thing I know I hear some growlin[g],” and he did not know what it was. He looked over and saw a “damn big ass dog just starin’ me in the face.” He did not know whether to shoot. He got his father and they were both outside. They tried to catch the dog “and then throw him back over the fence or do somethin’ cuz these neighbors over here they got the same kinda dog, you know. We grabbed him and he’s nice and we take it back over there no problem. I try to grab it – instantly – just vicious to the bone. I couldn’t even get near him ....”<sup>4</sup>

Officer Opinski asked Samuel why they did not call the police or call the neighbors to get their dog. Samuel said it happened so fast that they did not know what to do. “I was out scared for my life,” and it was “a vicious dog ... and to jump clean over the fence like that – I mean I have a three year old son too who lives here.”<sup>5</sup> Samuel said he had trouble trying to grab the dog to get it out of their backyard. “And he was, like, I mean vicious standing his ground ‘cause he was in the corner right here by the gate.”

Samuel again said the dog had “jumped over the fence,” and the dog would not let him near the gate to open it so the dog could leave. Samuel said he and his father tried to grab the dog. “I was tryin’ [to] scare it and then [Anthony] was just kinda like my back up....” Officer Opinski asked Samuel why he just did not go back into his house. Samuel said it happened “so fast,” and they did not know what to do.

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<sup>4</sup> The family that lived directly north of defendants had two German Shepherd dogs. Samuel’s statement apparently refers to a dog from that other family, that may have jumped the fence into defendants’ yard at some other time; Samuel favorably compared that dog as being nicer than Kuma.

<sup>5</sup> Samuel repeatedly said that he was trying to protect his three-year-old son but later admitted his child was inside the house during the entire incident.

### **Anthony's statement**

As Officer Opinski's second recorded conversation continued, he asked Samuel for his telephone number. Before Samuel could respond, Anthony said: "Hey, do you want to mount it Sammy?" Samuel replied, "Huh?" Samuel also said he was glad his son was not outside at the time and gave his telephone number.

### **Interview of Anthony**

Immediately after the above exchange, Officer Opinski's second recorded conversation continued, and he asked Anthony if he could talk with him.

Officer Opinski asked Anthony what happened. Anthony replied: "All I know is my son come runnin' around the corner said a dog's in the back come and help me, help me. I went in the back .... [¶] [A]ll I saw was teeth."

Officer Opinski asked Anthony if Samuel went into the house to ask him for help. Anthony said: "[T]he dog's in the back. Went around the corner to open and get him outta there. [T]here was no gettin' him. He tried to reach to get 'em to open the gate." Opinski asked Anthony why they did not go back into their house or call the police or the neighbors. Anthony said they had to "get the dog outta there," and "[e]very time we call dispatcher does somethin' different ...."

### **Arrest of Anthony**

Officer Opinski testified that as he talked to Samuel and then Anthony, other officers were in the Saesee family's home and watching their surveillance videos. Thereafter, Opinski arrested Anthony.

### **Officer Opinski's third recorded conversation; second interview with Samuel**

The prosecution introduced a third recorded conversation from Officer Opinski's "body cam," where he spoke to Samuel after Anthony was arrested.<sup>6</sup>

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<sup>6</sup> Samuel's attorney argued that Samuel should have been advised of the warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) prior to this conversation

Officer Opinski asked Samuel to clarify some things. Opinski referred to a tear on Samuel's boot and whether it was from the dog. Samuel said the boot was frayed because the dog had "his teeth sunk in there and he just ripped it through." Opinski asked Samuel why there was "no slobber or anything" on his boot. Samuel said it happened so quick that he did not know.<sup>7</sup>

Officer Opinski told Samuel that Anthony said, "[Y]ou were outside, you went back inside to get him," but Samuel "first told me you were outside and your dad just happened to come out." Samuel said that he did not go inside the house and just told Anthony to come out. Opinski asked Samuel how he called to Anthony. Samuel said he was "yelling for him."

Officer Opinski asked Samuel if Anthony hit the dog with a bat. Samuel said Anthony used "that stick out there." Samuel said he had been outside smoking a cigarette, the dog was in his yard, and "what the hell do I do .... I was ready to shoot it," but thought they could "try to handle it with our hands ... 'cause we did the same thing to that neighbor's dog, we grabbed it and then we took it over there ...."

Officer Opinski asked Samuel if he picked up something in his hands. Samuel said no, that he went for the dog with his hands "and tried to grab him and ... take him back to wherever he belonged to."<sup>8</sup>

Officer Opinski asked Samuel if he had a stick. Samuel said, "No I didn't have no stick."

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since Anthony had been arrested. The court replied that Samuel was not in custody and *Miranda* warnings were not required.

<sup>7</sup> Officer Opinski testified that during this exchange, he examined Samuel's boot and did not see puncture marks, wetness, or anything consistent with a dog biting it.

<sup>8</sup> The surveillance video showed Samuel holding a baseball bat.



### **Arrest of Samuel**

Officer Opinski testified that at the conclusion of this conversation, he spoke to his supervisor, who had watched the Saesee family's surveillance video. His supervisor instructed him to arrest Samuel. Opinski took Samuel into custody and placed him in a patrol car.

After he arrested Samuel, Officer Opinski went into the Saesee family's house and watched their surveillance video.

### **The video of defendants beating the dog**

At this stage of the trial, the prosecution played the silent black and white video from the Saesee family's security camera that showed what happened to their dog.

Officer Opinski testified the video showed defendants' side yard, and both Anthony and Samuel were visible. There was a light consistent with a flashlight, and a shadow that was consistent with a large dog in defendants' yard. The video did not show how the dog got into defendants' yard.

Officer Opinski testified the video showed that the dog ran to the corner of defendants' yard. Samuel was standing on the left and holding a bat, and Anthony was standing on the right and holding a stick. The video showed that Anthony hit the dog with the stick 10 to 15 times, and it appeared he made contact with the animal. The blows were not continuous but delivered in segments, separated by five to 10 seconds. Samuel poked the dog with the baseball bat. Anthony moved trash cans that were next to the fence, and then Anthony moved the dog's body towards the patio area of their house, which is where the police found the dead animal when they arrived. Samuel moved a trash can to where the dog had been in the corner of the yard.

### **Samuel's postarrest statements**

Officer Opinski testified that after he watched the video, he contacted Samuel in the patrol car and advised him of the *Miranda* warnings. Samuel agreed to answer

questions. This interview was the fourth video from Opinski's "body cam" that was introduced into evidence.

Officer Opinski told Samuel that the neighbors had security cameras that captured the entire thing and he watched the video. Opinski asked Samuel whether he wanted to clarify what happened because the camera "doesn't lie," and to tell him the truth this time.

Samuel said he went outside to smoke a cigarette. "I seen the dog was growling at my face and was about to attack." He didn't know whether to open the house door because his young son was inside. "I went over there, I had a stick in my hand."

Officer Opinski told Samuel that he did not have a stick and asked what he was holding. Samuel said he was holding a bat. Opinski asked for the location of the bat. Samuel said it should be in the backyard.<sup>9</sup>

Officer Opinski told Samuel what he saw on the security video:

"[OFFICER OPINSKI]: Okay, the dog was in the backyard. You two [referring to Anthony] cornered it and actually the video shows the dog running to the corner [of defendants' backyard] with his tail between his legs. The video shows you pinning the dog down with the bat, then you standing on top of it while you dad [Anthony] beats the dog to death with that stick ...

"[SAMUEL]: I didn't know whether or not I should let up. I mean, it's a vicious dog. I mean, it could've killed me.

"Q: But it's not vicious in the video.

"A: It's a vicious dog.

"Q: It's not, because if it was vicious – we have vicious dogs. We have vicious German Shepherds. Vicious German Shepherds do not, by any means, put their tail between their legs ... and I've been on several canine bites with our dogs, okay? Our police canines. Those are

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<sup>9</sup> Officer Flores testified that he asked Deanna if the bat was in the residence, and she retrieved a baseball bat and gave it to him. There were blood smears on the bat.

aggressive dogs. Those dogs will attack you. They're not scared of anyone.

"A: I've never been around dogs like that.

"Q: The dog does not put his tail between his legs. A dog that puts his tail between his legs is a scared dog.

"A: I didn't know – I was scared.

"Q: *This dog was scared and went to the corner to get away from you two, you and your dad. You and your dad went over to it. You pinned it down and stood on the dog's chest while your dad beat the dog to death.*

"A: *What was I supposed to do?*

"Q: What were you supposed to do? How about call your neighbor? Have them come get their dog?

"A: *They're having a fight with my parents.*

"Q: How about open the gate?

"A: I mean ... *they're threatening my parents.*

"Q: Well, let's put it this way, the corner that you pinned the dog in, okay? 'Cause if the dog is viciously attacking me, I'm not gonna go step on it. I'm not gonna touch it. I'm gonna get the hell away from it. And the corner the dog was pinned in, you guys could've easily opened the gate to the backyard, very easily opened it. But you didn't. *You stood on the chest of the dog while your dad came over with a stick and hit it I don't know how many times in the head....*

"A: I don't know what to say.

"Q: ... then what you did was – the video shows you guys moving the dog to where we found it where the – supposedly the attack happened and *then you guys moved the dog and laid it where ... we found the dog.*

"A: I have no clue what...

"Q: And then you tried covering up the corner with the trash can. It's all on video.

"A: Yeah.

“Q: I’m just tryin[g] to get some honesty out of you.

“A: I’m trying to be ...

“Q: No, you’re not. ‘Cause when I do something I remember what I did.

“A: Well it happened so fast, you know? I mean ... I put the ... garbage over the, uh, fence ‘cause I didn’t know whether the neighbors were gonna come through or what the hell. I was tryin’ to block that off and make sure, you know? That’s why my mom and dad, or my mom called you guys ‘cause we have no clue – I don’t have really any clue of what just, you know. *I don’t know what ... I just listened to my parents.*

“Q: Okay. [¶] Is this the deal you had in your hand?

“A: Yes, that’s it. [¶] ... [¶]

“Q: What’s the blood from?

“A: I dropped it. I mean, *as I was using both my hands to try to hold the dog down, you know, tryin’ to get it down ....*

“Q: What was that?

“A: I’m tryin’ to be as completely honest with you guys as I can. I’m just kind of freaked out by this whole situation here. That dog jumped in our fence ....” (Italics added.)

Officer Opinski again told Samuel to be honest because the entire incident was on video. Samuel said that he held down the dog “so it didn’t attack us.” Opinski replied that the dog ran away from him. Samuel said the dog was biting his foot. Opinski said the video showed Samuel standing on the dog’s chest, and it was “probably defending itself. If someone came and stood on your chest, are you gonna let ‘em do it?”

Samuel said he was defending his property and his young son who was in the house. Opinski asked how he was defending them from a dog “that runs away from you.” Samuel said he was not running “at first,” and the dog was growling in his face when he came outside. Opinski replied: “He might have growled initially, but the video shows the dog running to the corner with its tail between its legs.”

Samuel asked Officer Opinski if the neighbor's camera was pointed into his backyard. Opinski said it was pointed at the neighbor's side gate, but it caught the corner of defendants' backyard "where it happened." Samuel asked if that was an invasion of their privacy. Opinski said no, because the neighbors intended to watch their own side gate.

Samuel said he thought "we were completely in the right, you know. It was our property," and he did not know he was breaking the law. Officer Opinski asked if he thought it was okay to kill a dog that came into his backyard and advised Samuel that the neighbor's family heard them talk about it after it was over.<sup>10</sup>

"[OFFICER OPINSKI]: You never said, 'We finally got that f[\*\*]ker?'

"[SAMUEL]: He finally jumped over the fence....

"Q: So did you say that?

"A: *I could've. I mean ... it's a mix-up, man....*" (Italics added.)

Officer Opinski again told Samuel it was better to tell the truth. Samuel replied he was trying to be as honest as he could, and if "you've got it on camera" then that was "definitive" because it had been recorded. Samuel said:

"Right when we – actually we got it to the submissive point to where it was actually walking and I was – I was dragging it, you know, not dragging it, but I was walking it to the light, to the sunlight, you know? Tryin' to get a better view, maybe we could get it up to the gazebo or somethin' like that? But it just started tryin' to bite me on the arm. And then .. makin' me want to cry just thinkin' about it. I don't wanna kill no dogs. I don't do that type of shit. I'm a deer hunter."

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<sup>10</sup> Officer Opinski was referring to the statement that Eddie heard when he was in his family's backyard and looking for Kuma, and a younger male voice said: " 'Wow, what a bloody mess. We finally got that f[\*\*]ker.' "

### **Anthony's statement at the jail**

After the investigation at the house, Officer Opinski transported Anthony from his house to the county jail. Anthony was under arrest and in handcuffs. Samuel was not present. When Opinski arrived at the jail's sally port, he had to park behind another officer's vehicle, which was a K-9 unit. The officer's German Shepherd K-9 dog was inside the patrol car, and the rear windows were down so the dog could get air.

Officer Opinski escorted Anthony from his patrol car into the jail. As they passed the K-9 unit, the police dog started to bark. Opinski testified that Anthony said, " 'Why don't you let that motherf[\*\*]er out? I'll kill it, too.' "

Officer Opinski's body camera was not on at the time this happened. Opinski testified that Samuel was not present when Anthony made this statement.

On cross-examination, Officer Opinski testified Anthony claimed his right to remain silent when he was arrested. Anthony's attorney asked Opinski about when they arrived at the jail, and whether he told Anthony, " 'I've got a dog that will kick your ass.' " Opinski testified that he could not remember making such a statement.<sup>11</sup>

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<sup>11</sup> Both defendants objected to Officer Opinski's testimony about Anthony's statements at the jail and argued his original report did not mention the incident, Opinski's "body cam" was not running and the statements were not recorded; and Opinski's supplemental report about the jail statements was not timely provided during discovery. Samuel's attorney argued the evidence about Anthony's statements at the jail would be highly prejudicial, and he would not be able to cross-examine Anthony about the statements. The prosecutor argued the evidence was relevant to Anthony's motive and state of mind and refuted his self-defense claim. The prosecutor disputed defendants' assertion that the evidence was a surprise.

The court overruled defendants' objections and found Anthony's statement was relevant to the question about whether the security video of defendants' yard showed that Anthony's blows with the stick actually landed on the dog; the evidence was very probative and not unduly prejudicial under Evidence Code section 352; and the discovery issues were only relevant to the weight of the evidence and not its admissibility.

The court found the evidence was not prejudicial as to Samuel because Anthony spoke in the first person and did not implicate Samuel when he made the statements at the jail. Thereafter, Officer Opinski testified as set forth above.

## **DEFENSE EVIDENCE**

Samuel did not introduce any evidence.

Anthony offered a stipulation that Deanna, his wife, called 911 at 8:16 p.m. on January 16, 2015, to report the incident with the dog, and she was the first person to call the police.

On Anthony's motion, the court took judicial notice of sections of Chapter Six of the Merced Municipal Code regarding the treatment of animals, and these provisions were read to the jury – that an animal “at large” meant an animal off the premises of its owner and not under physical restraint; a “dangerous animal” meant any animal that could threaten or attack any person, requiring substantial defensive action by any person to prevent bodily injury; and that the owner could not permit the animal to be at large, make loud noises without provocation, or endanger the life or health of others.

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After Officer Opinski testified, Anthony's attorney moved outside the jury's presence to strike his testimony about the statements at the jail and requested an evidentiary hearing about whether Opinski engaged in certain misconduct during the incident at the jail. The court granted Anthony's request for an evidentiary hearing pursuant to Evidence Code section 402 outside the jury's presence.

At that hearing, Anthony testified that when he was arrested, he claimed his right to silence and did not make any statements. Anthony further testified that when the patrol car arrived at the jail, Officer Opinski told him: “ ‘I've got a dog for you. I'd like to see you kick this dog's ass.’ ” Anthony testified that when Opinski escorted him into the jail, he “had me right up against the wall of the dog. I was pushed up against the dog while the dog was going crazy in the back seat.” Anthony testified he could not remember what he said at the jail about the police dog, but it “possibly” could have been something similar to what Opinski had testified about. Opinski also testified at the hearing and denied that he made the statements about the K-9 dog claimed by Anthony.

The court denied Anthony's motion to strike Officer Opinski's testimony about his statements at the jail: “[W]eighing the testimony of the two parties, which is the only thing the Court has to look at in making that decision, I don't believe that Officer Opinski did make a statement to prompt [Anthony] to incriminate himself after *Miranda*.” The court granted the motion from Anthony's attorney to recall Opinski before the jury, as set forth above.

### **Charges, convictions and sentence**

After a jury trial, defendants Anthony and Samuel were convicted as charged of count 1, cruelty to an animal (§ 597, subd. (a)), with enhancements for each count that defendants personally used deadly and dangerous weapons in the commission of the offense: that Samuel used a baseball bat, and Anthony used a stick (§ 12022, subd. (b)(1)).

The probation report stated that both defendants were ineligible for probation pursuant to sections 12022, subdivision (b)(1) and 1192.7, subdivision (c)(23) unless there were unusual circumstances, and none were present. The report stated defendants showed no remorse and their actions were callous and senseless. The report recommended the denial of probation and that each defendant receive a prison term of 16 months, two years, or three years for the substantive offense, plus one year for the enhancement.<sup>12</sup>

On September 1, 2016, the court conducted the sentencing hearing and found the crime was “a totally unnecessary act on the part of the defendants,” the dog was not threatening anyone, and they could have called their neighbors to get the dog.

“The evidence appeared to me at trial that it was strictly a retaliation for this ongoing argument that had occurred over the course of couple of years at least, it sounds like. If not, the last six months. And so from that standpoint, it did appear to me that it was a completely intentional and malicious action.”

However, the court found unusual circumstances in this case to support the grant of probation because the defendants did not have significant criminal histories that would

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<sup>12</sup> The probation report stated Samuel had a juvenile history in Merced County for petty theft, vandalism, assault and battery, and had been referred to juvenile probation several times. At the sentencing hearing, the probation officer said Samuel had “an extensive juvenile record,” but he had never been adjudged a ward and the cases had been handled informally within the department. Anthony had a prior conviction for misdemeanor resisting an officer in 1995 and was placed on probation.



dictate state prison terms. The court suspended imposition of sentence and placed both defendants on three years of formal supervised probation subject to certain terms and conditions, including for both defendants to serve 300 days in the county jail; to stay away from the Saesee family's home; and not to have any contact in person, by telephone, mail or electronically, with specific members of the family who were identified and listed by name in the court's order. The court advised defendants that any contacts would constitute a probation violation.<sup>13</sup>

### **Appellate contentions**

Samuel and Anthony have filed separate appellate briefs.

Samuel contends the court should have given CALCRIM No. 305, that Anthony's pretrial statements could not be considered against him. Alternatively, Samuel argues defense counsel was prejudicially ineffective for failing to request the instruction.

Both Anthony and Samuel assert the deadly weapon enhancement must be stricken as a matter of law because it can only be imposed for felonies committed against human beings.

## **DISCUSSION**

### **I. CALCRIM No. 305**

Samuel contends the court should have given a modified version of CALCRIM No. 305 that would have instructed the jury not to consider Anthony's pretrial statements against Samuel. Samuel asserts the court had a sua sponte duty to give the instruction, the failure to give the instruction affected his substantial rights, and the absence of the instruction permitted the jury to consider Anthony's statements against him. In the alternative, Samuel argues counsel's failure to request the instruction was ineffective assistance, and the error was prejudicial.

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<sup>13</sup> Samuel's attorney advised the court that defendants and their family no longer lived in the house next to the Saesee family.

We review the court's evidentiary and instructional rulings and find the absence of such an instruction was not prejudicial under the circumstances of this case.

**A. *Instructional Conference***

As set forth above, the prosecution introduced evidence that the police responded to the Saesee's family house in 2014 because Anthony was spraying water on their dog; Eddie's testimony that on the night of the incident, as he looked for Kuma in his aunt's backyard, he heard a younger male voice say: " 'Wow, what a bloody mess. We finally got that f[\*\*]ker' "; and Samuel's lengthy statements at the scene about what happened to Kuma.

The prosecution also introduced video evidence that when Officer Opinski was questioning Samuel about the incident, Anthony said, "Hey do you want to mount it Sammy?" Officer Opinski further testified when he escorted Anthony into the jail, they walked by a K-9 patrol unit vehicle, the dog inside the vehicle barked, and Anthony said: " 'Why don't you let that mother[\*\*]er out? I'll kill it, too.' "

At the instructional conference, the court asked the parties whether CALCRIM Nos. 304 and 305 should be given.<sup>14</sup>

"THE COURT: ... And let's see. Also on [CALCRIM No.] 305, I had a question on that. [¶] [CALCRIM No.] 304 has to do with the same evidence admissible against one defendant.

"[SAMUEL'S ATTORNEY]: Right. My argument would be in regards to the evidence that came in against Anthony in regards to Kuma being sprayed with water, *that wasn't admissible to show Sam's motive because Sam wasn't involved in that.*

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<sup>14</sup> CALCRIM No. 304 states: "I instructed you during the trial that certain evidence was admitted only against [] certain defendants. You must not consider that evidence against any other defendant."

CALCRIM No. 305 states: "You have heard evidence that defendant ... made a statement (out of court ...). You may consider that evidence only against (him), not against any other defendant."

“THE COURT: Okay. [¶] Any objection to that by the People?

“[SAMUEL’S ATTORNEY]: [CALCRIM No.] 304.

“[THE PROSECUTOR]: 304?

“[SAMUEL’S ATTORNEY]: Yes.

“THE COURT: The only thing we would have to change is – it says, ‘I instructed you during the trial,’ well, I didn’t actually do that. But the general statement that that admissible [sic] is only – *evidence is only admissible against Samuel – no – against Anthony, not Samuel, I think is appropriate.*

“[THE PROSECUTOR]: That’s fine.

“[ANTHONY’S ATTORNEY]: *I think that may apply to my client’s last statement, also.*

“THE COURT: Well, 305 is one that has to do with statements.

“[ANTHONY’S ATTORNEY]: Okay.

“[SAMUEL’S ATTORNEY]: Right.

“[ANTHONY’S ATTORNEY]: This doesn’t –

“THE COURT: I think since the only statement played was Samuel’s and Anthony invoked, then we have to have 305, as well, too. [¶] Is that okay with you [referring to the prosecutor]?

“[THE PROSECUTOR]: That’s fine.” (Italics added.)

## ***B. The Instructions***

The trial court subsequently instructed the jury with CALCRIM Nos. 304 and 305 as follows:

“I instructed you during the trial that certain evidence was admitted only against a certain defendant. You must not consider that evidence against the other defendant.

“You have heard evidence that the defendant Samuel Clendenin made a statement out of court before trial. You may consider that evidence only against him and not against the other defendant.”

The court did not give an instruction that Anthony’s statements could not be considered against Samuel.

***C. The Parties’ Closing Arguments***

In closing argument, the prosecutor argued the videotape showed both defendants beating the dog, Samuel stood on top of it while Anthony continued to beat it, and the video refuted their self-defense claims. He did not address Anthony’s statements at the jail.

Samuel’s attorney argued “much more” was going on that was not shown in the video, Samuel was shocked and afraid when he was confronted by the dog in the backyard, both defendants tried to get the dog out of the yard, the dog attacked them and was “even more dangerous than a person,” and the video actually showed defendants protecting themselves. “If they wanted to hurt this dog, they’re not going to do it in front of the cameras.”<sup>15</sup>

Anthony’s attorney argued the video did not show how Kuma got into defendants’ backyard, the dog likely jumped the fence because Kuma’s owners violated the municipal code and failed to properly restrain their dog, Anthony ran outside to help his son when he was confronted by the dog, the cornered dog was still a threat to them, the dog would have attacked them if they ran back into the house, and they had to defend themselves.

In rebuttal, the prosecutor again ran the videotape and argued it showed Kuma was not vicious; it was not threatening defendants because it retreated to the corner of defendants’ yard with its tail between its legs. The prosecutor argued Samuel’s self-defense claims were not credible and pointed out inconsistencies in his pretrial

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<sup>15</sup> When Officer Opinski advised Samuel that the entire incident was filmed on the Saesee family’s security camera, Samuel asked if that was an invasion of their privacy, implying that he did not know the camera showed his backyard.

statements, such as his claim that he was defending his young son even though the child was inside the house during the entire incident. The prosecutor also argued Anthony's claim of self-defense was not credible and noted Anthony's prior act of spraying the dog with the hose, and his admission to Officer Opinski that there had been an ongoing problem with the neighbors about the dog.

“How much anger or malice does a person have to have before he beats his retreating neighbor's dog to death? How much anger? [¶] And then to top it off, when [Anthony is] taken to the Merced County Jail and he passes by another police vehicle that has a K-9 unit in it with its windows down because it's hot, he says, 'Why don't you let that mother[\*\*]ker out so I can kill it again? I can kill him, too.' [¶] What type of person says that? A person filled with malice. That's what type of person says that.”

**D. Analysis**

Samuel initially asserts the court had a sua sponte duty to give a modified version of CALCRIM No. 305, that Anthony's statements could not be considered against him, but ultimately concedes such a duty did not exist in this case. Instead, he argues his failure to object to the absence of the instruction does not forfeit appellate review of the issue because the omission affected his substantial rights.

A court is required to instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial. (*People v. Moon* (2005) 37 Cal.4th 1, 25.) However, the court is not required to give a pinpoint or limiting instruction in the absence of a request. (*People v. Ervin* (2000) 22 Cal.4th 48, 91; *People v. Manning* (2008) 165 Cal.App.4th 870, 880.)

As set forth above, when the court discussed CALCRIM Nos. 304 and 305 at the instructional conference, Samuel's attorney stated that the evidence about Anthony spraying the hose on the dog “wasn't admissible to show Sam's motive because Sam wasn't involved in that.” The court apparently agreed, and then the parties discussed the language of CALCRIM No. 304. The court stated it would modify CALCRIM No. 304, that “evidence is only admissible against Samuel – no – against Anthony, not Samuel, I

think is appropriate.” Anthony’s attorney added: “I think that may apply to my client’s last statement, also,” referring to Anthony’s statement at the jail. The prosecutor did not object.

When the court instructed the jury, however, it only modified CALCRIM No. 305 to state that Samuel’s statements could not be considered against Anthony. Samuel’s attorney did not object to the instruction that was given, or request another modified version of CALCRIM No. 305 to state that Anthony’s statements could not be considered against Samuel.

“It is settled that ‘a defendant need not object to preserve a challenge to an instruction that incorrectly states the law and affects his or her substantial rights.’ [Citations.] Even so, ‘ “ “ “ ‘a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general *or incomplete* unless the party has requested appropriate clarifying or amplifying language.’ ” ’ ” ’ [Citation.]” (*People v. Mackey* (2015) 233 Cal.App.4th 32, 106, italics in original.) CALCRIM No. 305 was given in this case, but Samuel argues it should have been further modified to address Anthony’s statements. Samuel’s attorney was well-aware of Anthony’s statements at the jail, given the extensive evidentiary objections that both defendants raised and their efforts to exclude Officer Opinski’s testimony about the incident. If counsel believed the instruction should have been further modified, he failed to object to the version that was given, and the issue has been forfeited. (*People v. Chism* (2014) 58 Cal.4th 1266, 1308 [“Because the trial court was not obligated to provide a limiting instruction, defendant forfeited the issue by failing to request either a correction of the given instruction or a new instruction that applied specifically to the charges against defendant. [Citation.]”].)

In the alternative, Samuel contends his attorney was prejudicially ineffective for failing to object. “In order to demonstrate ineffective assistance, a defendant must first show counsel’s performance was deficient because the representation fell below an

objective standard of reasonableness under prevailing professional norms. [Citation.] Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 214–215.)

Any error arising from the absence of a modified version of CALCRIM No. 305 was harmless because there is no reasonable probability the jury would have reached a more favorable verdict if the court had given the instruction. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *People v. Mackey*, *supra*, 233 Cal.App.4th at p. 109 [instructional error regarding CALCRIM No. 305 is evaluated under the "*Watson* standard of prejudice"]; *People v. Larsen* (2012) 205 Cal.App.4th 810, 830.)

Samuel contends that the evaluation of prejudice is not similar to reviewing a record for substantial evidence but asserts this was a "close case, especially whether [Samuel] used the bat in self-defense," Samuel was "scared not only for himself but his young son," Samuel "acted to protect himself and his family" from "what appeared to be a wild animal in his backyard," "this was not a tea cup poodle but an 80 pound German Shepard [*sic*] in [his] backyard," and Samuel's statement that Eddie overheard in the backyard was merely said "in the heat of the battle."

Despite Samuel's initial statements to Officer Opinski, and his trial claims of self-defense because the dog was "standing" its ground, the evidence was overwhelmingly against him. When the police arrived, Samuel concocted a story designed to justify the fatal beating of the neighbor's dog: He was confronted by an animal that was about to attack him, he called his father for help, and he had no choice but to defend himself and his young child against a vicious animal. Samuel did not realize that his neighbor's security camera depicted the side of defendants' adjacent yard and debunked his version of the incident, and he later acknowledged his young child was inside the house at all

times. When Opinski advised Samuel about the video evidence, Samuel's response was to question whether that was an invasion of his family's privacy. The most damaging evidence against Samuel were his conflicting statements to Opinski, the videotape that refuted his story, and admission that he may have made the statement Eddie heard when he looked for his family's dog in the backyard: " 'Wow, what a bloody mess. We finally got that f[\*\*]ker.' "

Anthony's pretrial statements about whether he wanted to "mount" the dead dog, and his statements at the jail about the police K-9 dog, are not as inflammatory as what was depicted on the videotape: Samuel stepping on Kuma and using a baseball bat to hold down the dog while Anthony beat the animal with the stick, as it futilely tried to get away from them.

In addition, the prosecutor never attributed Anthony's statements to Samuel or argued they undermined Samuel's claim of self-defense. Instead, the prosecutor argued Samuel's self-defense claim lacked credibility based on Samuel's conduct on the videotape, the statement overheard by Eddie, and the inconsistencies in Samuel's statements to Officer Opinski. The prosecutor separately attacked Anthony's credibility by relying on the videotape and cited his statements at the jail as further undermining his self-defense claim.

It is not reasonably probable a different result would have been reached had the jury been instructed to not consider Anthony's pretrial statements against Samuel, and any alleged error was harmless. (*People v. Manning, supra*, 165 Cal.App.4th at p. 880.)

## **II. The Deadly Weapon Enhancements**

Both defendants were charged and convicted with the substantive offense of animal cruelty (§ 597, subd. (a)), and the jury found true the enhancements that they both personally used deadly and dangerous weapons in the commission of the offense: that Samuel used a baseball bat and Anthony used a wooden stick (§ 12022, subd. (b)(1)).



Defendants argue the deadly weapon enhancements cannot apply in this case as a matter of law because they did not use the weapons against a human being.<sup>16</sup>

**A. *Animal Cruelty***

We begin with the provisions of the substantive charge. Section 597, subdivision (a), defines the offense of animal cruelty and states that, with exceptions not applicable to this case, “every person who *maliciously and intentionally* maims, mutilates, tortures, or wounds a living animal, or *maliciously and intentionally* kills an animal, is guilty of a crime” punishable as either a felony or a misdemeanor. (Italics added.)

The jury herein was instructed on the elements of the charged offense in CALCRIM No. 2953:

“[T]he defendants are charged with cruelty to animal in violation of ... Section 597(a). To prove that the defendants are guilty of this crime, the People must prove that the defendant killed a living animal; and, secondly, the defendant acted maliciously.

“Someone acts maliciously with [*sic*] he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, annoy, or injure an animal.”

Section 597, subdivision (a) is a general intent crime. (*People v. Alvarado* (2005) 125 Cal.App.4th 1179, 1190.) In the context of animal cruelty, malice is defined in general as “a wish to vex, annoy, or injure” a living animal, or “an intent to do a wrongful act ....” (§ 7, par. 4; *People v. Dunn* (1974) 39 Cal.App.3d 418, 420.) “The expressions ‘willfully,’ ‘knowingly,’ ‘intentionally,’ and ‘maliciously’ are expressions of general, not specific, intent when used in a penal statute. [Citations.]” (*People v. Alvarado, supra*, 125 Cal.App.4th at p. 1188.) “General intent is present ‘[w]hen a person intentionally does that which the law declares to be a crime ... even though he may not know that his act or conduct is unlawful.’ ” (*People v. Turner* (1983) 145 Cal.App.3d 658, 682,

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<sup>16</sup> Samuel and Anthony have joined in each other’s arguments on the deadly weapon enhancement. We will thus refer to their arguments jointly.

disapproved on other grounds in *People v. Newman* (1999) 21 Cal.4th 413, 422, fn. 6 and *People v. Majors* (1998) 18 Cal.4th 385, 411.)

***B. The Enhancements***

The amended information alleged that in the commission of the offense of animal cruelty, both defendants personally used deadly weapons within the meaning of section 12022, subdivision (b)(1), which states:

“A person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense.”

The jury was instructed with CALCRIM No. 3145 on the elements of the enhancement:

“If you find the defendants guilty of the crime charged, you must then decide whether for each crime the People have proved the additional allegation that the defendants personally used a deadly or dangerous weapon during the commission or attempted commission of the crime.

“A deadly or dangerous weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that ... it is capable of causing and likely to cause death or great bodily injury.

“In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed and where the person who possessed the object was going and whether the object was changed from its standard form and any other evidence that indicates whether the object would be used for a dangerous weapon rather than a harmless purpose.

“ ‘Great bodily injury’ means significant or substantial physical injury. It’s an injury that is greater than minor or moderate harm.

“Someone personally uses a deadly or dangerous weapon if he or she intentionally does any of the following. First, displays or uses the weapon in a menacing manner; or, secondly, hits someone with the weapon.

“The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.”

As applied to section 12022, “[t]here are two classes of dangerous or deadly weapons: instrumentalities that are weapons in the strict sense, such as guns and blackjacks; and instrumentalities which may be used as weapons but which have nondangerous uses, such as hammers and pocket knives. [Citation.] Instrumentalities in the first category are ‘ “dangerous or deadly” ’ per se. [Citation.] An instrumentality in the second category is only ‘ “dangerous or deadly” ’ when it is capable of being used in a ‘ “dangerous or deadly” ’ manner and the evidence shows its possessor intended to use it as such. [Citation.]” (*People v. Burton* (2006) 143 Cal.App.4th 447, 457.)

“In determining whether an object which is not inherently deadly or dangerous has been used as a dangerous or deadly weapon, ‘the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue.’ ” (*People v. Blake* (2004) 117 Cal.App.4th 543, 555, fn. omitted.)

“[A]n item commonly used for a nonviolent purpose, such as a baseball bat or a table leg, could qualify as a [dangerous or deadly weapon] ... only ‘when the attendant circumstances, including the time, place, destination of the possessor, the alteration of the object from standard form, and other relevant facts indicate[] that the possessor would use the object for a dangerous, not harmless, purpose.’ [Citation.]” (*People v. King* (2006) 38 Cal.4th 617, 624; see also *People v. Aguilar* (1997) 16 Cal.4th 1023, 1029; *People v. Brown* (2012) 210 Cal.App.4th 1, 7; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1054; *In re Jose R.* (1982) 137 Cal.App.3d 269, 276, fn. 3.)

### **C. Analysis**

Prior to trial, both defendants moved to strike the section 12022 enhancements that were alleged against them. They argued a dog was personal property, and the enhancement could only be imposed when the underlying substantive offense was

committed against a human being and not personal property. The court relied on *People v. Smith* (2007) 150 Cal.App.4th 89 (*Smith*) and denied the motion.

On appeal, defendants renew their arguments that the section 12022 deadly weapon enhancement may be imposed only when the substantive offense is committed against a human being and not an animal. They concede the identical argument was rejected in *Smith* but argue that case was wrongly decided. Defendants argue a baseball bat is not an inherently dangerous weapon, it cannot be treated as a deadly or dangerous weapon under section 12022 if it was used to damage personal property, a dog is “mere property,” and the bat is only a dangerous weapon – and enhancement only applies – if it was used against a human being.

In *Smith*, the defendant was convicted of animal cruelty for killing his girlfriend’s dog with a knife. The jury also found the section 12022, subdivision (b)(1) deadly weapon enhancement true. (*Smith, supra*, 150 Cal.App.4th at pp. 92–93.) *Smith* rejected the same argument raised in this case: that the deadly weapon enhancement only applied to a crime committed against a human being.

“The language of section 12022, subdivision (b)(1) prohibits the use of a deadly or dangerous weapon ‘in the commission of *a felony* or attempted felony,’ and states that an additional and consecutive one-year term *shall* be imposed for its violation. (*Italics added.*) The statute is subject to a single exception: where use of the deadly or dangerous weapon is an element of the underlying offense. Cruelty to an animal, in violation of section 597, subdivision (a), is a felony. (§ 17.) [U]se of a deadly or dangerous weapon is not an element of that offense. Thus, the plain meaning of section 12022, subdivision (b)(1) supports imposition of a deadly weapon use enhancement based on a violation of section 597, subdivision (a). (See *People v. Dyer* (2002) 95 Cal.App.4th 448, 454–455 ... [a violation of § 597, subd. (a) is a crime of ‘ “force or violence” ’ and may be the basis for finding a defendant a mentally disordered offender since the statutory language is clear and does not except crimes of force or violence against animals] [(*Dyer*)].) If we were to follow [the defendant’s] interpretation, we would be required to insert the words ‘ “against a person” ’ into the statute. [Citation.] We have no authority to ‘ “rewrite

the statute to conform to an assumed intention which does not appear from its language.” ’ [Citation.]” (*Id.* at p. 94, italics in original.)

# 1. Wims

Defendants argue that *Smith* was wrongly decided because it ignored the California Supreme Court’s holding in *People v. Wims* (1995) 10 Cal.4th 293 (*Wims*), that held the section 12022 enhancement only applied if a deadly weapon was used against another person. However, *Smith* addressed and rejected this argument and explained why *Wims* did not control the resolution of this issue:

“[The defendant] contends this enhancement can only be imposed when the deadly or dangerous weapon is used against a human being because in ... *Wims*[, *supra*,] 10 Cal.4th [at p.] 302 ..., the Supreme Court stated, ‘[i]n order to find “true” a section 12022(b) allegation, a fact finder must conclude that, during the crime or attempted crime, the defendant himself or herself intentionally displayed in a menacing manner or struck someone with an instrument capable of inflicting great bodily injury or death.’ [Defendant] argues the term ‘someone’ can only refer to a human being.

“*Wims* observed that the jury instruction for section 12022, subdivision (b) is adapted from the language of section 1203.06, which prohibits probation where a firearm is used in the commission of certain crimes. (*Wims*, *supra*, 10 Cal.4th at p. 302.) Section 1203.06, subdivision (b)(2) states: ‘As used in subdivision (a), “used a firearm” means to display a firearm in a menacing manner, to intentionally fire it, [or] to intentionally strike or hit a human being with it ....’ [The defendant] interprets this language to mean that a firearm is ‘used’ only when the victim is a human being. Because the jury instruction for section 12022, subdivision (b) was adapted from section 1203.06, [the defendant] argues that section 12022, subdivision (b)(1) should be interpreted to apply only when a deadly or dangerous weapon is used against a human being. He points out that section 12022, subdivision (b) was added to the Penal Code the same year section 1203.06 was amended. Thus, he argues the Legislature viewed these sections as parallel provisions, and the definition of the word ‘use’ in section 12022, subdivision (b)(1) should be imported from section 1203.06, subdivision (b)(2).

“We are not persuaded. Although the *Wims* court did use the word ‘someone’ in discussing section 12022, subdivision (b), the crime in that case involved a human victim. (*Wims*, *supra*, 10 Cal.4th at p. 299.) *Wims*

did not address the issue presented in this appeal. [The defendant's] argument for importing the definition of the word 'use' from section 1203.06, subdivision (b)(2) is contrary to the plain meaning of section 12022, subdivision (b)(1). 'In construing a statute, our role is to ascertain the Legislature's intent so as to effectuate the purpose of the law. [Citation.] In determining intent, we must look first to the words of the statute because they are the most reliable indicator of legislative intent. [Citation.] If the statutory language is clear and unambiguous, the plain meaning of the statute governs. [Citation.]' [Citation.]" (*Smith, supra*, 150 Cal.App.4th at pp. 93–94, fn. omitted.)

## 2. Dyer

Defendants raise another challenge to *Smith*'s holding and contend it erroneously relied on *Dyer, supra*, 95 Cal.App.4th 448, and *Dyer* does not support *Smith*'s conclusions. The defendant in *Dyer* was convicted of animal cruelty after killing a dog by slitting its throat. After he was released on parole, the defendant attacked and beat his father. He was diagnosed with a schizoaffective disorder, transferred to a state hospital, and, after a trial, he was committed as a mentally disordered offender (MDO). On appeal, he argued that the court erroneously relied on his animal cruelty conviction to order the commitment. (*Id.* at p. 451.)

*Dyer* held that the defendant's conviction for animal cruelty rendered him eligible for an MDO commitment under the relevant statutory authorities, which provided that any crime of force or violence qualified for an MDO commitment. *Dyer* held nothing in the relevant statutes limited the qualifying offense to a crime committed against a human being. (*Dyer, supra*, 95 Cal.App.4th at pp. 454–455.) *Dyer* held its interpretation was consistent with the underlying purpose of the MDO law, which was "to protect the public by identifying those offenders who exhibit violence in their behavior and pose a danger to society. [Citation.] It does not take a leap in logic to conclude that an individual who violently or forcefully injures an animal might be dangerous to people." (*Id.* at p. 455.)

"We recognize that dogs are considered personal property or chattels for some purposes. [Citation.] But dogs are different than inanimate objects. They are living, breathing creatures, and the slashing of a dog's

throat is an act of violence against a living being. Applying the MDO statute in this context is consistent with the legislative intent to protect the public from violent and dangerous felons.” (*Id.* at p. 456.)

*Dyer* acknowledged that “our holding today may support the conclusion that a crime against an inanimate object or property can qualify as a crime of force or violence under the catchall provision” of the MDO law but declined to rewrite the statutory provisions in the absence of legislative amendments. (*Dyer, supra*, 95 Cal.App.4th at pp. 456–457.)

*Dyer* does not undermine the holding in *Smith*, and it clearly rejected the arguments raised by defendants in this case. However, defendants assert *Dyer* was wrongly decided because the dissent in *Dyer* correctly analyzed the issue in that case. The dissent in *Dyer* disagreed with the majority opinion’s analysis of the relevant MDO statutes, and instead concluded that while the defendant in that case committed a violent and heinous crime against a dog, he could only be subject to an MDO commitment if he committed such an offense against a human being. (*Dyer, supra*, 95 Cal.App.4th at p. 460 (dis. opn. of Perren, J.).)

We decline to find that *Dyer* was wrongly decided, or the dissent was more persuasive. The California Supreme Court denied review in *Dyer*, and the same court that decided *Dyer* subsequently reaffirmed its holding. (*People v. Green* (2006) 142 Cal.App.4th 907, 912–913.)

The California Supreme Court also denied review in *Smith*. Pursuant to the statutory interpretation in *Smith*, we conclude that section 12022, subdivision (b) was applicable to this case, where defendants personally used deadly weapons in the commission of the felony of animal cruelty when Samuel used a baseball bat and Anthony used a stick to beat and kill Kuma.<sup>17</sup>

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<sup>17</sup> It would seem arguable that an act charged as a felony under section 597, subdivision (a) and not subdivision (b), would, in almost every instance, involve the use of a deadly weapon as a virtual element of the offense for the purpose of a section 12022,

**DISPOSITION**

The judgments are affirmed.

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POOCHIGIAN, J.

WE CONCUR:

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HILL, P.J.

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MEEHAN, J.

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subdivision (b)(1) enhancement analysis. Other forms of animal torture are explicitly punishable under the subdivision (b) that encompass a broader range of acts – some of which might include use of a deadly weapon and others not, e.g., from killing and maiming to withholding food and water. While defendants do not rely on such argument, it might be useful for the Legislature to clarify its intent with respect to the lack of express reference to dangerous or deadly weapons in sections 597, subdivisions (a) and (b) and the significance, if any, of inclusion of some acts common to both subdivisions.